DUNING JUBIN

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, BINTULU
TEE AH SING J
[CRIMINAL APPEAL NO: 41-01-96]
19 JULY 1996

CRIMINAL LAW: *Commercial Vehicles Licensing Board Act 1987, s. 51(3) - Vehicle used to transport goods without permit - Forfeiture of vehicle - Whether mandatory - Whether judge should inquire into ownership of vehicle - Road Transport Act 1987, s. 15(1)*

WORDS & PHRASES: *"Goods vehicle" - Commercial Vehicles Licensing Board Act 1987, s. 2*

The appellant had been charged with three offences, namely: (i) driving a logging truck on a public road without a valid road tax, an offence under s. 15(1) of the Road Transport Act 1987 ('the RTA'); (ii) driving the same truck without a valid insurance policy, an offence under s. 90(1) of the RTA; and (iii) driving the said truck on a public road carrying a load of 15 pieces of timber without a permit, an offence under s. 34(1) of the Commercial Vehicles Licensing Board Act 1987 ('the CVLBA'). The appellant pleaded guilty to all three charges and was convicted and sentenced. The truck was ordered to be forfeited and disposed of. The appellant appealed against the order of forfeiture and disposal. Counsel for the appellant contended that: (i) before making the order of forfeiture, the magistrate should have inquired into the true ownership of the truck and given him an opportunity to be heard; (ii) the magistrate had erred in holding that the order of forfeiture was a mandatory requirement under s. 51(3) of the CVLBA; and (iii) magistrate had failed to take into consideration the fact that the truck was not a commercial vehicle within the definition of the CVLBA.

Held:

[1] Section 51(3) of the CVLBA does not impose upon the court a discretion to call the owner or anyone else having a legitimate interest in the vehicle. There is no provision for any enquiry, in the CVLBA unlike s. 407 of the Criminal Procedure Code ('the CPC'). However, as the provisions of s. 51(3) of the CVLBA are specific provisions, they override the general provisions of s. 407 of the CPC, and to allow for an enquiry would be against the express provisions of the statute.

[2] Under s. 51 of the RTA, it is provided, *inter alia,* that an order for the forfeiture of any motor vehicle seized by any police officer not below the rank of Inspector, 'shall' be made by the court if it is proved that an offence against ss. 33 or 34 had been committed and the vehicle was the subject matter of the offence. The word 'shall' has been held to be a mandatory provision and therefore, once the elements of s. 51 are satisfied, it is mandatory upon the court to make an order for the forfeiture of the vehicle. Section 51 of the RTA is to be distinguished from s. 92(4) of the Road Traffic Ordinance 1958 and all the cases relating thereto, as the operative word in s. 92(4) was 'may' and not 'shall'.

[3] The vehicle was seized by a chief inspector under s. 51(1) of the CVLBA, an offence under s. 34(1) of the CVLBA was committed and the truck was the subject matter of the offence. Consequently the learned magistrate was correct in making the order of forfeiture.

[4] Under s. 2 of the CVLBA, a 'commercial vehicle' includes goods vehicles and 'goods' means anything, including livestock carried in a motor vehicle for the purpose of any trade or business. A vehicle becomes a goods vehicle when used for the carriage of goods solely or in addition to passengers. There is no doubt that the timber carried on the truck were 'goods' within the meaning of s. 2 of the CVLBA. Thus the said truck was a goods vehicle under s. 34(1) of the CVLBA.

[Appeal dismissed.]

Cases referred to:

BBMB Kewangan Berhad v. Jabatan Pengangkutan Jalan Negeri Johor Darul Takzim & Anor [1994] 1 CLJ 497 ***(dist)***

Chung Khiaw Bank Ltd v. PP [1968] 2 MLJ 196 ***(refd)***

Kiaw Aik Hang Co Ltd v. PP [1962] 28 MLJ 276 ***(cit)***

PP v. Lim Hock Seng [1962] 28 MLJ 398 ***(cit)***

Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1997] 1 CLJ 596 ***(aff)***

Legislation referred to:

Criminal Procedure Code, s. 407(2)

Commercial Vehicles Licensing Board Act 1987, ss. 2, 33, 34(1), 51(1), (3)

Road Transport Act 1987, ss. 2, 15(1)

Road Traffic Ordinance 1958, s. 92(4)

Rules of the High Court 1980, O. 92 r. 1

For the appellant - Dominic Lai; M/s Dominic Lai & Co
For the respondent - Thomas Akin Jelimin, SFC

Reported by Anne Khoo

JUDGMENT

Tee Ah Sing J:

In this appeal the appellant was charged for the following offences:

1. Bahawa kamu pada 20.9.1995 jam lebih kurang pukul 1815 hrs. di KM 64, Jalan Bintulu/Sibu, Bintulu sebagai pemandu sebuah lori balak yang berdaftar nombor SE 5092Q telah memandu kenderaan tersebut di atas jalanraya dengan tiada cukai jalan, oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen 15(1) Akta Pengangkutan Jalan 1987 dan boleh dihukum di bawah Seksyen 119(2) Akta yang sama.

2. Bahawa kamu pada 20.9.1995, jam lebih kurang pukul 1815 hrs. di KM 64, Jalan Bintulu/Sibu, Bintulu sebagai pemandu sebuah lori balak yang berdaftar nombor SE 5092Q telah memandu kenderaan tersebut di atas jalanraya dengan tiada dilindungi insuran polisi, oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen 90(1) Akta Pengangkutan Jalan 1987 dan boleh dihukum di bawah Seksyen 90(2) Akta yang sama.

3. Bahawa kamu pada 20.9.1995 jam lebih kurang pukul 1815 hrs. di KM 64, Jalan Bintulu/Sibu, Bintulu sebagai pemandu sebuah lori balak yang berdaftar nombor SE 5092Q telah memandu kenderaan tersebut di atas jalanraya dengan membawa muatan kayu balak lima belas batang tanpa permit, oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen 34(1) Akta Lembaga Perlesenan Kenderaan Perdagangan 1987 dan boleh dihukum di bawah Seksyen tersebut akta yang sama.

The appellant pleaded guilty to the three charges. He was convicted and sentenced. The lorry registration No. SE 5092Q was forfeited.

The appellant in this appeal was dissatisfied with the order of forfeiture and disposal of the timber lorry bearing registration No. SE 5092Q made by the Learned Magistrate and appealed against the forfeiture and disposal.

The learned counsel for the appellant submitted that before ordering forfeiture of the said logging truck, the Learned Magistrate has failed to enquire who is the true owner of the said logging truck and that the true owner thereof was not given an opportunity to be heard. In support the following authorities were cited namely:

(a) *Chung Khiaw Bank Ltd. v. PP* [1968] 2 MLJ 196.

(b) *Kiaw Aik Hang Co. Ltd. v. PP* [1962] 28 MLJ 276.

(c) *PP v. Lim Hock Seng* [1962] 28 MLJ 398

The true owner of the said logging truck is Shin Jang Sdn. Bhd.

The learned counsel for the appellant also submitted that the Learned Magistrate erred in law in determining that order of forfeiture is a mandatory requirement under s. 51(3) of the Commercial Vehicles Licensing Board Act 1987 ('the Act').

It was further submitted that the Learned Magistrate has failed to take into consideration that the said logging truck is not a commercial vehicle within the definition of the Act.

The learned Senior Federal Counsel for the respondent submitted that s. 51(3) of the Act provided for mandatory forfeiture of vehicle provided that two conditions have been complied with. First the vehicle must be seized by a police officer with the rank of Inspector. Secondly the accused is convicted under s. 33 or 34 of the Act. So it is his submission that once the two conditions have been satisfied the forfeiture will follow after conviction and inquiry before the forfeiture is unnecessary. The case of *Chung Khiaw Bank Ltd. v. PP* [1968] 2 MLJ 196 was distinguished.

He also submitted that the lori balak is a commercial vehicle.

In reply the learned counsel for the appellant submitted that forfeiture is not mandatory. In support the case of *BBMB Kewangan Berhad v. Jabatan Pengangkutan Jalan Negeri Johor Darul Takzim & Anor* [1994] 1 CLJ 497 was cited.

I shall first deal with the issue whether the said timber lorry bearing registration No. SE 5092Q is a goods vehicle under s. 34(1) of the Act.

In s. 2 of the Act, "commercial vehicle" includes public service vehicles and goods vehicles; "goods" means anything, including livestock carried on or in a motor vehicle for the purpose of any trade or business but does not include:

(a) equipment ordinarily used with the vehicle;

(b) articles of merchandise carried by a person on or in the vehicle solely for the purpose of exhibition as samples;

(c) articles carried by a person on or in the vehicle for use in the exercise of his trade business or profession and not for sale;

"goods vehicle" means:

(a) any motor vehicle constructed or adapted for use for the carriage of goods; or

(b) any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers, but does not include a private motor car drawing a trailer for purposes unconnected with trade or business;

"motor vehicle" means:

a vehicle of any description, propelled by means of a mechanism contained within itself and constructed or adapted so as to be capable of being used on roads, and includes a trailer;

"road" shall have the same meaning as assigned to it in s. 2 of the Road Transport Act, 1987.

"vehicle" means a motorised structure capable of moving or being moved or used for the conveyance of any person or thing and which maintains contact with the ground when in motion.

Under s. 2 of the Road Transport Act 1987 "road" means "(a) any public road and any other road to which the public has access ..."

According to the definition a goods vehicle may be constructed and adapted for use for the carriage of goods, and if not so constructed and adapted for such use it becomes a goods vehicle when used for the carriage of goods solely or in addition to passengers.

It is clear that the only type of vehicle excepted from the definition is a private motor car drawing a trailer for purposes unconnected with any trade or business. There is no other exception.

From the brief facts of the case at p. 5 of the Record of Appeal it is clear that on 20 September 1995 at about 6.15pm a team of police led by Chief Insp. Welfered Chin stopped a timber lorry bearing registration number SE 5092Q at Km 64, Jalan Bintulu/Sibu, Bintulu for carrying 15 timber logs without permit. Four photographs (exhs. P1-4), showing the timber lorry with the timber logs on it were tendered to the court (see pp. 11 to 13 of the Record of Appeal).

I am of the view there is no doubt that the kayu balak carried by the lori balak are "goods" within the definition of "goods" in s. 2 of the Act.

Further Km 64, Jalan Bintulu/Sibu Bintulu is a public road. In the brief facts of the case it is stated that "telah menahan sebuah lori balak nombor pendaftaran SE 5092Q". This shows that it is a motor vehicle as defined under s. 2 of the Act.

Further by looking at the photographs tendered (PI4) one can say with confidence that the lori balak shown is a motor vehicle.

Section 34(1) of the Act reads as follows:

> 34(1) Subject to this Act, no person shall use a goods vehicle or cause or permit a goods vehicle to be used for the carriage of goods unless there is in force a carrier's licence granted under this Act authorising such use, or otherwise than in accordance with such licence and any conditions attached thereto, and if he does so he shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding one year or to both.

I am therefore of the view that the said lori balak registration No. SE 5092Q is a goods vehicle under s. 34(1) of the Act.

In *Chung Khiaw Bank Ltd. v. Public Prosecutor* [1968] 2 MLJ 196 the Federal Court in a criminal reference held that in respect of forfeiture of a motor vehicle seized under s. 92 of the Road Traffic Ordinance 1958, the court has discretion under s. 92(4) of the Ordinance to forfeit the vehicle or order the release of the vehicle and that the court should hold an inquiry under s. 407(ii) of the Criminal Procedure Code and at such inquiry the true legal owner of the vehicle has a right to be heard. Section 92(4) of the Road Traffic Ordinance clearly provides that an order for the forfeiture or for the release of the motor vehicle seized shall be made by the court before which the prosecution has been held and that an order for the forfeiture of such vehicle may be made if it is proved to the satisfaction of the court that an offence has been committed and that the vehicle was the subject matter of the offence, not-withstanding that no person may have been convicted of such an offence. The operative words in s. 92(4) with regard to forfeiture are "an order for the forfeiture of such vehicle **may** be made if it is proved to the satisfaction of the court that an offence against that section has been committed." (The bold is by me:)

The forfeiture provision under s. 92(4) of the Road Traffic Ordinance 1958 is clearly distinguishable from the forfeiture provision of the Act.

Section 51 of the Act provides as follows:

51(1) Any motor vehicle in respect of which there has been or there is reasonable cause to suspect that there has been committed any offence against ss. 33 or 34 may be seized by any road transport officer or any police officer not below the rank of Inspector at any place.

(2) when any motor vehicle has been seized under sub-s. (1), a road transport officer or a police officer not below the rank of Inspector may, at his discretion, temporarily return such vehicle to the owner of the same, on security being furnished to the satisfaction of such officer that the vehicle shall be surrendered to him on demand.

(3) An order for the forfeiture or for the release of any motor vehicle seized under sub-s. (1) shall be made by the court before which the prosecution with regard thereto has been held, and an order for the forfeiture of such vehicle shall be made if it is proved to the satisfaction of the court that an offence against s. 33 or 34 has been committed and that the vehicle was the subject matter of the offence, notwithstanding that no person may have been convicted of such an offence.

(4) If there is no prosecution with regard to any motor vehicle seized under sub-s. (1), such vehicle shall be released at the expiration of one calendar month from the date of seizure unless it has sooner been released.

The word "shall" in O. 92 r. 1 of the Rules of the High Court 1980 has been held by the Supreme court to be a mandatory provision in the case of *Syarikat Telekom Malaysia Bhd. v. Business Chinese Directory Sdn. Bhd.* [1994] 2 MLJ 420. Further in *Chung Khiaw Bank Ltd. v. PP* [1968] 2 MLJ 196, His Lordship MacIntyre FJ (delivery the decision of the Federal Court) at p. 198 said:

> It appears to us that the learned judge has strained the language of the section in reading into it the proposition that an order for forfeiture must follow a conviction. If that was the intention of the legislature it would have clearly expressed that intent by saying that "an order for the forfeiture of such vehicle shall be made" instead of "may be made." In our opinion, "may" as used on sub-s. (4) means "may" and nothing more.

In s. 51(3) of the Act the words used are "and an order for the forfeiture of such vehicle **shall** made." (Bold is mine).

Thus I am of the view that the word "shall" is a mandatory provision.

Once it is proved that any motor vehicle has been seized under s. 51(1) by any road transport officer or any police officer not below the rank of Inspector and it is also proved that an offence under s. 33 or 34 has been committed and that the motor vehicle was the subject matter of the offence then its mandatory upon the court to make an order for the forfeiture of the motor vehicle.

Exhibit P3 is the police report lodged by Chief Insp. Wilfered Chin in respect of the seizure of the timber lorry No. SE 5092Q by him.

In exh. P3 it is clearly stated that "saya K/Insp. Wilfered Chin merampas sebuah lori No. SE 5092Q untuk tujuan penyitaan rampasan adalah di buat di bawah s. 51(1) Akta Lembaga Perlesenan Kenderaan Perdagangan."

So there is evidence that the said timber lorry No. SE 5092Q has been seized by Chief Insp. Wilfered Chin under s. 51(1) of the Act.

And from the brief facts it is clear that the timber lorry No. SE 5092Q was carrying 15 timber logs without permit when it was stopped at Km 64, Jalan Bintulu/Sibu, Bintulu.

Therefore an offence under s. 34(1) of the Act has been committed and that the said timber lorry was the subject matter of the offence.

Therefore the learned Magistrate was correct in making an order for the forfeiture of the said timber lorry.

Section 51(3) of the Act does not impose upon the court a discretion to call the owner and anyone else who may have a legitimate interest in the vehicle, an opportunity to show cause why it shall not be forfeited. If parliament had intended to give an opportunity to show cause why the vehicle shall not be forfeited then it would have enacted relevant provisions to provide for the same.

In *BBMB Kewangan Berhad v. Jabatan Pengangkutan Jalan Negeri Johor Darul Takzim & Anor* [1994] 1 CLJ 497 His Lordship James Foong J at p. 499 said:

> The forfeiture order was granted in pursuance to s. 51 of the CVLB Act due to the fact that Subas was charged and pleaded guilty to s. 33 of the CVLB Act. Section 51 of the CVLB Act grants a discretion to the Magistrate trying the case to determine whether to forfeit or release the vehicle seized for an offence against s. 33 or 34 of the CVLB Act.

With due respect to His Lordship James Foong J I beg to differ. In my considered opinion once it is proved that the motor vehicle has been seizable by any road transport officer or any police officer not below the rank of Inspector and that an offence against s. 33 or 34 of the Act has been committed and that the motor vehicle was the subject matter of the offence then it is mandatory for the magistrate to make an order for the forfeiture of the motor vehicle. There is no discretion given to the magistrate because of the words "shall be made" in s. 51(3) of the Act.

Section 407 of the Criminal Procedure Code is a general provision relating to the order for disposal of property regarding which an offence has been committed and provides that during or at the conclusion of any inquiry or trial in any criminal court the court may make such order as it thinks fit for the custody or disposal of any property or document whatsoever produced before it regarding which any offence appears to have been committed or which has been used for the commission of any offence. But the words of s. 51(3) of the Act are so clear that an order for forfeiture shall be made if it is proved to the satisfaction of the court that an offence against s. 33 or 34 has been committed and that the motor vehicle was the subject matter of the offence.

There is no doubt also that the general provisions of s. 407 of the Criminal Procedure Code are overridden by the specific provision of s. 51(3) of the Act with regard to disposal of property and that to have an inquiry under s. 407 of the Criminal Procedure Code would in any case be meaningless for the court must give effect to the express words of s. 51(3) of the Act.

There is no provision or scope for an enquiry under s. 51(3) of the Act. To allow for an enquiry would be against the express provisions of the statute.

For the above reasons the appeal is dismissed.